

**STATE OF MICHIGAN
IN THE SUPREME COURT**

IN RE REQUEST FOR ADVISORY
OPINION REGARDING
CONSTITUTIONALITY OF 2005 PA 71

Supreme Court No. 130589

BRIEF OF THE MICHIGAN HOUSE OF REPRESENTATIVES

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ORAL ARGUMENT REQUESTED

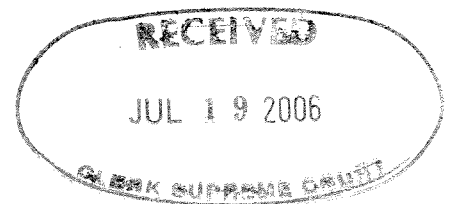


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STATEMENT OF THE BASIS OF JURISDICTION

The legislature enacted 2005 PA 71, which includes Section 523. Among other things, Section 523 contains photo identification provisions related to voting, and it takes effect on January 1, 2007.

The Constitution permits either house of the legislature or the governor to "request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." Const 1963, art 3, § 8.

The House of Representatives adopted a resolution requesting this Court to issue an advisory opinion regarding the constitutionality of the photo identification provisions of 2005 PA 71.

This Court granted the request to issue an advisory opinion. This Court has jurisdiction pursuant to Const 1963, art 3, § 8.

STATEMENT OF QUESTION PRESENTED

This Court granted the request of the Michigan House of Representatives for an advisory opinion on the following question:

Do the photo identification requirements of Section 523 of 2005 PA 71, MCL 168.523, on their face, violate either the Michigan Constitution or the United States Constitution?

The Michigan House of Representatives answers "No."

I. INTRODUCTION

The issue in this case is whether it is constitutional for the State of Michigan, in order to prevent election fraud, to ask a voter either to present photo identification or to sign an affidavit stating that the voter does not have such identification. Given that Americans are routinely required to present photo identification for numerous everyday activities, the suggestion that it is unconstitutional for the State to require the same in order to prevent voter fraud is not plausible. This is particularly true where the specific law at issue (2005 PA 71, § 523, MCL 168.523) does not even require one to obtain photo identification in order to vote. A voter may sign an affidavit stating that he or she does not have photo identification, and then he or she is allowed to vote.

A photo identification voter law was previously passed by the legislature in 1996, but within days of its enactment, the attorney general opined that it violated the Equal Protection Clause of the United States Constitution. The attorney general's opinion is simply wrong. Michigan's photo identification voter law is a reasonable, nondiscriminatory regulation which serves the important state interest of preventing election fraud. The law *protects* the right to vote by preventing a citizen's vote from being diluted by fraudulent voters, in exchange for the slight "burden" of identifying oneself through photo identification or signing an affidavit that the voter has no such photo identification.

For these reasons, more fully discussed herein, this Court should hold that Michigan's photo identification voter law is not unconstitutional on its face.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Nearly a decade ago, the Michigan Legislature enacted Public Act 583 of 1996 ("1996 PA 583"), Section 523(1) of which provided, in pertinent part:

At each election, before being given a ballot, each registered elector offering to vote shall identify himself or herself by presenting an official state identification card . . . an operator's or chauffeur's license . . . or other generally recognized picture identification card and by executing an application showing his or her signature or mark and address of residence in the presence of an election official. . . . If the elector does not have an official state identification card, operator's or chauffeur's license as required in this subsection, or other generally recognized picture identification card, the individual shall sign an affidavit to that effect before an election inspector and be allowed to vote as otherwise provided in this act. However, an elector being allowed to vote without the identification required under this subsection is subject to challenge as provided in section 727. [MCL 168.523(1)].

Thirteen days after enactment but prior to the legislation taking effect, former Attorney General Frank J. Kelley opined that the photo identification provisions of Section 523 were unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *See* OAG, 1997-1998, No 6930, p 1 (January 29, 1997) ("OAG 6930") (attached as Ex A). The Attorney General thought that: (1) the photo identification provisions of Section 523 are subject to strict scrutiny; (2) the provisions do not further a compelling state interest because there allegedly existed no proof of substantial voter fraud in Michigan in 1996; (3) the State already prevents voter fraud by less drastic means; and (4) the provisions impose economic and logistical burdens on the poor, non-drivers, the elderly, the handicapped, and those who do not possess a picture

identification card. *Id.* As a result of OAG 6930, the photo identification provisions of Section 523 were never implemented by the executive branch.¹

¹ Election administrators did not implement the photo identification provisions of 1996 PA 583 apparently because of two generally held misconceptions about the nature of the attorney general's power. The first misconception is that the attorney general has the authority to declare enactments of the legislature unconstitutional and unenforceable. However, as observed by this Court:

While the opinion of the Attorney General that a statute is unconstitutional does not have the force of law and certainly does not compel agreement by a governmental agency, it is universally recognized that among the primary missions of a state attorney general is the duty to give legal advice, including advice concerning the constitutionality of state statutes, to members of the legislature, and departments and agencies of state government. [East Grand Rapids School Dist v Kent Co Tax Allocation Bd, 415 Mich 381, 394; 330 NW2d 7 (1982) (emphasis supplied).]

The second misconception is that opinions of the attorney general are binding on state officers and agencies. Although the question has been addressed several times in dicta, no Michigan appellate court has ever held that opinions of the attorney general are binding. *See Danse Corp v City of Madison Hgts*, 466 Mich 175, 182 n 6; 644 NW2d 721 (2002) ("the extent to which a governmental agency is even bound by an opinion of the Attorney General is open to question"). In a background footnote in *Traverse City School Dist v Att'y Gen'l*, 384 Mich 390, 407-410 n 2; 185 NW2d 9 (1971), this Court stated in *obiter dictum* that "[a]lthough an opinion of the Attorney General is not a binding interpretation of law which courts must follow, it does command the allegiance of state agencies." In support of this proposition, the *Traverse City* footnote cites three cases that do not even address the question of whether attorney general opinions are binding on state agencies. *Id.* at 407-410 n 2 (citing *Fowler v Kavanagh*, 63 F Supp 167 (ED Mich 1944); *Detroit Edison Co v Dept of Revenue*, 320 Mich 506, 31 NW2d 809 (1948); *David Walcott Kendall Memorial School v City of Grand Rapids*, 11 Mich App 231; 160 NW2d 778 (1968)). Nonetheless, and whatever was meant by the phrase "command the allegiance of," state agencies and the Court of Appeals in dicta have treated the *Traverse City* footnote as rubric that attorney general opinions are binding on state agencies. *See Michigan Beer & Wine Wholesalers Ass'n v Att'y Gen'l*, 142 Mich App 294, 300; 370 NW2d 328 (1985); *People v Waterman*, 137 Mich App 429, 439; 358 NW2d 602 (1984); *Queen Airmotive, Inc v Michigan Dept of Treasury*, 105 Mich App 231, 236; 306 NW2d 461 (1981); *People v Penn*, 102 Mich App 731, 734; 302 NW2d 298 (1981). In fact, attorneys general have directly instructed that their opinions are binding on state departments, agencies and officers. *See* Letter Opinion of the Attorney General to Representative D. J. Jacobetti (May 1, 1979) ("When advising State agencies and prosecutors, I consider such advice as binding whether in letter form or in the form of an opinion to be published"), *cited in* 2005 OAG No 7174 (April 4, 2005). *See also*

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Last year, the legislature enacted Public Act 71 of 2005 ("2005 PA 71"), which amended numerous provisions of the Michigan Election Law, 1954 PA 116. Public Act 71 includes an amended Section 523, which incorporates the photo identification provisions first adopted in 1996 PA 583 as well as other voting procedures.² The amended Section 523 (hereafter "Section 523") takes effect January 1, 2007.

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OAG, 1977-1978, No 5156, p 66 (March 24, 1977); OAG, 1981-1982, No 5864, p 64 (March 17, 1981); OAG, 1981-1982, No 5858, p 54 (March 18, 1981).

The Michigan Constitution recognizes the attorney general as an executive officer, but does not define the duties and powers of the office. *See* Const 1963, art 5, §§ 10, 21, 23, 30. No statute grants the attorney general the right to declare a law unconstitutional or unenforceable, or to issue binding opinions. In particular, the statute granting authority to issue opinions provides only that "[i]t shall be the duty of the attorney general, when required, to give his opinion upon all questions of law submitted to him by the legislature, or by either branch thereof, or by the governor, auditor general, treasurer or any other state officer" MCL 14.32. The attorney general is a subordinate member of the executive branch. Const 1963, art 5, § 1 ("The executive power is vested in the governor"); *Lucas v Bd of Co Road Comm'rs of Wayne Co*, 131 Mich App 642, 662-663; 348 NW2d 660 (1984). If the attorney general can prevent implementation of state law by declaring it unconstitutional, the attorney general can effectively veto legislation—without review or appeal. Yet the Constitution does not contemplate a role for the attorney general in the law-making process. Const 1963, art 4, § 2 (legislative power is vested in the House of Representatives and Senate); Const 1963, art 4, § 33 (right to veto legislation assigned to the Governor). Further, only the judicial branch may declare a law legally unenforceable. Const 1963, art 6, § 1 (judicial power is "vested exclusively" in the judicial branch); Const 1963, art 3, § 8 (allowing Supreme Court to decide "important questions of law upon solemn occasions as to the constitutionality of legislation").

²

Section 523 of 2005 PA 71 provides:

(1) At each election, before being given a ballot, each registered elector offering to vote shall identify himself or herself by presenting an official state identification card issued to that individual pursuant to Act No. 222 of the Public Acts of 1972, being sections 28.291 to 28.295 of the Michigan Compiled Laws, an operator's or chauffeur's license issued to that individual pursuant to the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws, or other generally recognized picture identification card and by executing an application showing his or her

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signature or mark and address of residence in the presence of an election official. If an elector's signature contained in the qualified voter file is available in the polling place, the election official shall compare the signature upon the application with the digitized signature provided by the qualified voter file. If an elector's signature is not contained in the qualified voter file, the election official shall process the application in the same manner as applications are processed when a voter registration list is used in the polling place. If voter registration lists are used in the precinct, the election inspector shall determine if the name on the application to vote appears on the voter registration list. If the name appears on the voter registration list, the elector shall provide further identification by giving his or her date of birth or other information stated upon the voter registration list. In precincts using voter registration lists, the date of birth may be required to be placed on the application to vote. If the signature or an item of information does not correspond, the vote of the person shall be challenged, and the same procedure shall be followed as provided in this act for the challenging of an elector. If the person offering to vote has signed the registration card or application by making a mark, the person shall identify himself or herself by giving his or her date of birth, which shall be compared with the date of birth stated upon the registration card or voter registration list, or shall give other identification as may be referred to upon the registration card or voter registration list. If the elector does not have an official state identification card, operator's or chauffeur's license as required in this subsection, or other generally recognized picture identification card, the individual shall sign an affidavit to that effect before an election inspector and be allowed to vote as otherwise provided in this act. However, an elector being allowed to vote without the identification required under this subsection is subject to challenge as provided in section 727.

(2) If, upon a comparison of the signature or other identification as required in subsection (1), it is found that the applicant is entitled to vote, the election officer having charge of the registration list shall approve the application and write his or her initials on the application, after which the number on the ballot issued shall be noted on the application. The application shall serve as 1 of the 2 poll lists required to be kept as a record of a person who has voted. The application shall be filed with the township, city, or village clerk. If voter registration cards are used in the precinct, the date of the election shall be noted by 1 of the election officials upon the precinct registration card of each elector voting at an election. If voter registration lists are used in the precinct, the election official shall clearly indicate upon the list each elector voting at that election. The clerk of a city, village or township shall maintain a record of voting participation for each registered elector.

Because of the attorney general's opinion that photo identification requirements are unconstitutional, the previous law languished for over 10 years without being implemented,³ notwithstanding the constitutional edict that "the governor shall take care that the laws be faithfully executed." Const 1963, art 5, § 8. Because of the specter that 2005 PA 71 may be unconstitutional and the history of non-implementation of the previous law, the House of Representatives adopted, by resolution, a formal request that this Court issue an advisory opinion regarding the constitutionality of the photo identification provisions of 2005 PA 71, pursuant to this Court's authority under Const 1963, art 3, § 8. HR 199 (adopted Feb 22, 2006).

On April 26, 2006, this Court granted the House of Representatives' request, announcing the question submitted as: "Do the photo identification requirements of Section 523 of 2005 PA 71, MCL 168.523, on their face, violate either the Michigan Constitution or the United States Constitution?"⁴ 474 Mich 1230 (2005).

³ The Secretary of State has publicly stated that Michigan's photo identification law "is unenforceable due to a 1997 attorney general's opinion that ruled the law unconstitutional." *Michigan Elections: Meeting 21st Century Challenges* (2006), available at <http://www.michigan.gov/sos/0,1607,7-127-1583-135185--,00.html>.

⁴ Because the question submitted is limited to whether the photo identification provisions of Section 523 are constitutional "on their face," factual evidence is irrelevant and should not be considered. Accordingly, no evidence is submitted by the House of Representatives. Moreover, OAG 6930 incorrectly opined that evidence of substantial voter fraud to support Section 523 was a constitutional necessity. This is plainly wrong. The State has "a legitimate, indeed compelling, interest in doing what it can to make sure that last month's fraudulent or no-longer-eligible registrant does not become next month's fraudulent voter." *Colorado Common Cause v Davidson*, 2004 WL 2360485 at *13 (Colo Dist Ct, October 18, 2004) (unpublished opinion) (attached as Ex B). *See also* *Munro v Socialist Workers Party*, 479 US 189, 195; 107 S Ct 533; 93 L Ed 2d 499 (1986) ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively"). Furthermore, "the striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which [] judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Griffin v Roupas*, 385 F3d 1128, 1131 (CA 7, 2004).

III. SUMMARY OF ARGUMENT

Photo identification provisions have been challenged on equal protection grounds in at least five other courts. Based on the arguments made in those cases, facial constitutional challenges to the photo identification provisions of Section 523 may include challenges based upon: (1) violations of the Equal Protection Clause by unduly burdening the fundamental right to vote; and (2) the imposition of a poll tax on voting.⁵ Each of these arguments is addressed below. Constitutional challenges to photo identification voter requirements have been rejected by courts in every other state confronted with such challenges, except one court which was confronted with a statute clearly distinguishable from Section 523. Constitutional challenges to Section 523 should also be rejected here.

As an initial matter, the applicable constitutional standard is not strict scrutiny. Although a fundamental right is involved, the United States Supreme Court has set forth a flexible standard for reviewing state election laws because the states, under the exercise of their authority under the Elections Clause, US Const, art I, § 4, must balance the interests of protecting the fundamental right to vote and ensuring fair and honest elections. *See Burdick v Takushi*, 504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992). Because Section 523 imposes only a slight burden on voters in that it asks for photo identification of those who have it but prevents no legitimate voter from casting a ballot that is counted through its affidavit exception, strict scrutiny does not apply. Under the applicable standard, Section 523 is constitutional if it furthers important regulatory interests and imposes only reasonable, nondiscriminatory restrictions. *Id.*

⁵ In the event that other interested parties present other theories or issues, the House of Representatives specifically requests the opportunity to submit additional briefing.

Section 523 satisfies this standard. Preventing election fraud is unquestionably an important state interest. Not only is it derived from federal and state constitutional directives to the state legislature, it preserves public confidence in our democratic system and protects the fundamental right to vote from dilution. On its face, Section 523 applies equally to all voters appearing at the polling place. It does not unconstitutionally discriminate and is reasonable in that it is rationally related to the prevention of fraud. It asks of each election day voter nothing more than that required to perform numerous everyday activities—namely, that citizens identify themselves by providing a picture identification card *if they have one*. For these reasons, Section 523 does not unduly burden the fundamental right to vote and does not violate the Equal Protection Clause.

Section 523 also does not impose a poll tax. If a voter does not have a photo identification card, he need not purchase one in order to vote. The voter may simply sign an affidavit at the voting precinct stating that he or she does not have a sufficient photo identification card as described in Section 523. The law accordingly imposes no financial burden.

For these reasons, the photo identification provisions of Section 523 are not, on their face, unconstitutional under the state or federal constitutions.

IV. ARGUMENT

A. Standards Of Constitutional Review

The constitutionality of a statute is considered *de novo* as a question of law. *Taylor v Gate Pharmaceuticals, Inc*, 468 Mich 1, 5; 658 NW2d 127 (2003). "Statutes are presumed to be

constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Id.* at 6. When considering the constitutionality of a statute, the Court does not inquire into its wisdom. *Id.*

"[V]oting is of the most fundamental significance under our constitutional structure." *Illinois State Bd of Elections v Socialist Workers Party*, 440 US 173, 184; 99 S Ct 983; 59 L Ed 2d 230 (1979). One does not, however, have a constitutional right to vote in any manner he or she pleases. *Munro v Socialist Workers Party*, 479 US 189, 193; 107 S Ct 533; 93 L Ed 2d 499 (1986).

Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." [*Burdick*, 504 US at 433 (*quoting Storer v Brown*, 415 US 724, 730; 94 S Ct 1274; 39 L Ed 2d 714 (1974)).]

In fact, the federal constitution itself contemplates such regulation, expressly providing that the states may prescribe "[t]he Times, Places and Manner of holding Elections." US Const, art I, § 4. The United States Supreme Court has held that "[i]t cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to . . . prevention of fraud and corrupt practices . . . [and] procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v Holm*, 285 US 355, 366; 52 S Ct 397; 76 L Ed 795 (1932). The Michigan Constitution further affirmatively directs that the legislature "shall enact laws to preserve the purity of elections . . . [and] guard against abuses of the elective franchise . . ." Const 1963, art 2, § 4.

In this regard, the United States Supreme Court has, in fact, "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson v Celebrezze*, 460 US 780, 788 n 9; 103 S Ct 1564; 75 L Ed 2d 547 (1983). This is in part because the fundamental right to vote protects not only a citizen's right to cast a ballot, but also protects against the dilution of the weight of a citizen's vote. *Reynolds v Sims*, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964). "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote." *Gray v Sanders*, 372 US 368, 381; 83 S Ct 801; 9 L Ed 2d 821 (1963). Simply stated, a citizen is disenfranchised if the weight of his or her vote is diluted. *Id.* In this regard, the prevention of fraud protects the fundamental right to vote by fortifying the principle of "one person, one vote," because fraudulent votes dilute legitimate votes.

Thus, although voting is a fundamental right, because the State must balance the interests of protecting the right to cast a ballot and ensuring fair and honest elections, not every law that imposes a burden on voters is subject to strict scrutiny. *See Anderson*, 460 US at 789 ("Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any 'litmus-paper test' . . . Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation"). Rather, the United States Supreme Court has set forth a "flexible standard" to be applied. *Burdick*, 504 US at 433, 434.

A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights. [*Id.* at 434 (*quoting*

Anderson, 460 US at 788; *Tashjian v Republican Party of Connecticut*, 479 US 208, 217; 107 S Ct 544; 93 L Ed 2d 514 (1986)) (internal quotation marks omitted).]

Where a state election law imposes a "severe" burden, it must be narrowly drawn to advance a compelling interest. *Burdick*, 504 US at 434 (*quoting Norman v Reed*, 502 US 279, 289; 112 S Ct 698; 116 L Ed 2d 711 (1992)). That is, the law must pass strict scrutiny. Where a state election law exacts a lesser burden on the other hand, important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. *Burdick*, 504 US at 434 (*quoting Anderson*, 460 US at 788).

B. Section 523 Does Not Violate The Equal Protection Clause By Unduly Burdening The Fundamental Right To Vote

The United States Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment guarantees certain fundamental constitutional rights, one of which is the right to vote. *See Harper v Virginia State Bd of Elections*, 383 US 663; 86 S Ct 1079; 16 L Ed 2d 169 (1966). Michigan's photo identification voter law, however, does not violate the Equal Protection Clause.

1. Strict Scrutiny Does Not Apply Because Section 523 Does Not Impose A Severe Burden On Voters

The initial issue when considering an equal protection challenge to a state election law is what constitutional standard to apply. Whether strict scrutiny applies depends on whether

Section 523 imposes a "severe burden" on the right to vote. *Burdick*, 504 US at 434. Section 523 does not. *See Bay Co Democratic Party v Land*, 347 F Supp 2d 404 (ED Mich 2004) (holding that the requirements provided in 42 USC 15483(b)(2), which require a voter who registered to vote by mail to present a photo identification or a utility bill, bank statement, government check, paycheck or other government document showing his or her name and address, were permissible for Michigan to use), *rev'd in part on other grounds*, *Mich State Conference of NAACP Branches v Land*, unpublished order of the U.S. Court of Appeals for the Sixth Circuit, decided October 24, 2004 (Docket No. 04-2307/2318); *League of Women Voters v Blackwell*, 340 F Supp 2d 823 (ND Ohio 2004).

Under Section 523, an individual must either (a) present a driver's license, official state identification card or "other generally recognized picture identification card," or (b) sign an affidavit that he or she does not have such identification. This is not a severe burden. "In our modern world, all of us must show identification for the most mundane reasons." *Colorado Common Cause v Davidson*, 2004 WL 2360485 at *12 (Colo Dist Ct, October 18, 2004) (unpublished opinion) (attached as Ex B). For example, photo identification is required to cash a check, to purchase alcohol or cigarettes, to board an airplane, and even to enter Michigan's Hall of Justice. Thus, presenting a photo identification at the polling place in order to prove identity imposes only a slight burden voters. *Blackwell*, 340 F Supp 2d at 831.

Furthermore, Section 523 does not even require photo identification in order to vote or have one's vote counted. An individual who does not have photo identification need only execute an affidavit to that effect:

If the elector does not have an official state identification card, operator's or chauffeur's license as required in this subsection, or other generally recognized picture identification card, the

individual shall sign an affidavit to that effect before an election inspector and be allowed to vote as otherwise provided in this act. [MCL 168.523.]

The affidavit is free-of-charge and will be available at the polling place. Moreover, an affidavit is no more burdensome than the application to vote an elector must already sign pursuant to Section 523. MCL 168.523(1). An affidavit is also no more burdensome than the affidavit required under the Help America Vote Act ("HAVA"), 42 USC 15301 *et seq.*, for registered voters who do not appear on a precinct voting list, 42 USC 15482(a)(2), and first-time voters who do not present documentary identification, 42 USC 15483(b)(2)(B). Thus, it cannot be seriously contended that Section 523 imposes a "severe" burden on the right to vote.

Case law is consistent with this conclusion. In *Indiana Democratic Party v Rokita*, 2006 WL 1005037 (SD Ind, April 14, 2006) (unpublished decision) (attached as Ex C), *appeal pending*,⁶ the district court rejected a constitutional challenge to an Indiana law requiring election day voters to present a photo identification card issued by the United States or the State of Indiana; if a valid identification card is not presented, the voter may cast a provisional ballot which is not counted unless, within 13 days of the election, the voter appears before the court clerk or county election board and either (a) proves his identity or (b) signs an affidavit of indigency or religious opposition. *Rokita*, 2006 WL 1005037 at *4-5. The *Rokita* court held strict scrutiny was not warranted because the Indiana law did **not** impose a severe burden on the right to vote. *Id.* at 34-36. The Indiana statute is comparatively more burdensome than the Michigan statute. Section 523 allows a voter to present a "generally recognized picture identification card" not just a government-issued identification card; to sign an affidavit at the

⁶ United States Court of Appeals for the Seventh Circuit Docket No. 06-2218.

polling place on election day; and to have his or her ballot counted without any further effort.⁷ Thus, if the Indiana statute does not impose a "severe" burden under the *Burdick* test, as the *Rokita* court held, Section 523 certainly does not.

In *Colorado Common Cause*, *supra*, the court rejected a constitutional challenge to a Colorado statute requiring all voters to provide one of ten forms of identification. *Colorado Common Cause*, 2004 WL 2360485 at *6. A voter that appears at the polls without valid identification may cast a provisional ballot which will be counted as long as the person's name appears on a registered voter list. *Id.* The court held that the Colorado statute did **not** impose a severe burden on the right to vote, and thus refused to apply strict scrutiny. *Id.* at 12.

The decision in *Common Cause/Georgia v Billups*, 406 F Supp 2d 1326 (ND Ga 2005), regarding the Georgia photo identification law—the only such law to be held unconstitutional—is distinguishable from the present case, as suggested by the *Billups* court itself. The Georgia statute at issue in *Billups* absolutely required photo identification as a condition of voting on election day. *Billups*, 406 F Supp 2d at 1362. An indigent voter without a sufficient photo identification card could obtain one prior to the election day by visiting a Department of Driver Services office and signing an affidavit of indigency. *Id.* at 1363. The court held the Georgia statute imposed a severe burden on voters. Section 523, however, is not similarly burdensome because (1) it permits alternative identification cards, and (2) through its affidavit provision, no identification card is necessary at all. Such alternatives distinguish Section 523 from the Georgia statute, as the *Billups* court itself recognized. *Id.* at 1327 n 10 (acknowledging the less stringent identification provisions in *Colorado Common Cause*, *Blackwell* and *Bay Co Democratic Party*,

⁷ Under Section 523, a voter without sufficient photo identification is subject to challenge as provided under MCL 168.727. However, a ballot voted by a challenged voter is counted. It is "uncounted" only if it is proven later that the person voting the ballot was an unqualified voter. See MCL 168.747; MCL 168.748.

and surmising that if Georgia's statute provided similar alternatives "Plaintiffs likely would not have filed this case").

Because Section 523 does not impose a "severe" restriction on the right to vote, the law is constitutional if it furthers an important state interest. *Burdick*, 504 US at 434. It need not be narrowly drawn to advance a compelling state interest. *Id.*

2. Section 523 Meets The Applicable Constitutional Standard

Where strict scrutiny does not apply, important regulatory interests are sufficient to justify reasonable, nondiscriminatory state election laws. *Burdick*, 504 US at 434 (*quoting Anderson*, 460 US at 788). Section 523 meets this standard.

a. Preventing Election Fraud Is An Important State Interest

The State has an important interest in regulating elections to prevent fraud, which necessarily includes correctly identifying individuals entitled to vote. *See Blackwell*, 340 F Supp 2d at 829 ("Few can doubt that deterrence, detection, and avoidance of election fraud are fundamentally important state and public concerns and interests") (*citing Storer*, 415 US at 730); *Billups*, 406 F Supp 2d at 1366 (holding that curbing vote fraud is a legitimate, important state interest); *Rokita*, 2006 WL 1005037 at *36 ("It is beyond dispute that Indiana has a compelling interest in ascertaining an individual's identity before allowing the person to vote"); *Davidson*, 2004 WL 2360485 at *13 (holding that the state has a compelling interest in preventing fraud). In fact, the prevention of fraud is so important to the people of the State of Michigan, the

Michigan Constitution expressly mandates that the legislature "enact laws to preserve the purity of elections . . . [and] guard against abuses of the elective franchise . . ." Const 1963, art 2, § 4.

b. Section 523 Is Reasonable

To determine whether a state election regulation is "reasonable" under *Burdick*, the Court must weigh the character and magnitude of the asserted injury to the right to vote against the precise interests put forward by the state as justifications for the burden imposed, taking into consideration "the extent to which those interests make it necessary to burden" voting rights. *Blackwell*, 340 F Supp 2d at 829 (*quoting Burdick*, 504 US at 434).

Section 523 prevents fraud by aiding the accurate identification of individuals who present themselves at the polls on election day, and does this through only a slight burden, as discussed *ante*. There can be little doubt that this is sufficient justification for the law. *Burdick*, 504 US at 434.

If elections are not substantially free from fraud and other irregularities, public confidence in their integrity and the validity of their results, which is essential to the maintenance of ordered liberty, is threatened. Few can doubt that deterrence, detection, and avoidance of election fraud are fundamentally important state and public concerns and interests. [*Blackwell*, 340 F Supp 2d at 829.]

Accordingly, the slight burden imposed by Section 523 is justified by the State's interest in detecting and preventing election fraud. *Id.*; *Rokita*, 2006 WL 1005037 at *36-37.

c. Section 523 Is Nondiscriminatory

Section 523, on its face, applies equally to all voters who vote at the polls. There can be no plausible suggestion that Section 523 is discriminatory or likely to be applied unevenly.⁸ *See Blackwell*, 340 F Supp 2d at 829 (explaining that complainants did not and could not plausibly contend that Ohio's identification requirement is discriminatory under *Burdick*). *See also Bay Co Democratic Party*, 347 F Supp 2d at 435 ("The plaintiffs have not shown that the regulations are discriminatory or are likely to be applied unevenly"). The law applies equally to every voter who appears at the polls on election day.

To the extent one claims that Section 523 discriminates by not applying to absentee voters, there is no support in the law "that a state may not impose different requirements on absentee and in-person voters." *Rokita*, 2006 WL 1005037 at *41. Thus, any claim that Section 523 violates the Equal Protection Clause by treating election day and absentee ballot voters differently is incorrect.

3. Section 523 Passes Constitutional Muster Under The Equal Protection Clause

As Section 523 establishes reasonable, nondiscriminatory election regulations and furthers an important state interest, it does not violate the Equal Protection Clause of the Fourteenth Amendment by unduly burdening the right to vote. *Burdick*, 504 US at 434.

⁸ Furthermore, it is beyond a facial challenge to speculate that Section 523 will not be applied in a uniform and non-discriminatory manner.

C. Section 523 Does Not Violate The Michigan Equal Protection Guarantee

The Michigan Constitution also specifically guarantees equal protection of the laws. Const 1963, art 1, § 2. However, the Michigan and federal equal protection clauses are coextensive. *TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 557; 629 NW2d 402 (2001). Because Michigan's equal protection guarantee is construed no more broadly than its federal counterpart, *Crego v Coleman*, 463 Mich 248, 258; 615 NW2d 218 (2000), the federal analysis provided above applies. Accordingly, Section 523 does not violate Const 1963, art 1, § 2.

D. Section 523 Does Not Impose A Poll Tax

The right to vote may not be denied or abridged by reason of any poll tax. US Const, Am XXIV (governing federal elections). *See also Harper*, 383 US 663 (holding that the payment of a fee as a requirement to voting in a state election constitutes an equal protection violation). A poll tax is a head tax that serves as a precondition to voting, thus disenfranchising those unable to pay the tax. *See id.*, at 664 n 1. Section 523 imposes no poll tax.

Section 523 does not require a voter to obtain photo identification in order to vote. If an individual does not have the photo identification described in the statute, such individual can simply sign an affidavit to that effect. Such affidavit is **free-of-charge** and available at the poll. Accordingly, a voter does not need to obtain a photo identification card and thus is not required to pay any fee or "poll tax" in order to vote. In short, there is no poll tax.

Further, Section 523 permits an individual to present a "generally recognized picture identification card," which may not necessarily require a fee to obtain. In addition, an "official

state identification card" is per se sufficient photo identification under Section 523. While an individual may obtain such a card by paying a fee, MCL 28.292(12), the secretary of state must waive the fee if the applicant is 65 years of age or older, has his or her driver's license suspended because of a mental or physical infirmity or disability, is statutorily blind, wishes to add or remove an anatomical gift insignia on an existing card, or "presents other good cause for a fee waiver."⁹ MCL 28.292(14).

For these reasons, Section 523 does not impose a poll tax in violation of the Twenty-Fourth or Fourteenth Amendment.

V. THE HOUSE OF REPRESENTATIVES RESPECTFULLY REQUESTS THE OPPORTUNITY TO PARTICIPATE IN ORAL ARGUMENT

The House of Representatives is one of but three entities entitled to request an advisory opinion, Const 1963, art 3, § 8, and the only such entity that requested an advisory opinion on the photo identification provisions of 2005 PA 71. This Court's order granting such request did not address whether the House of Representatives was entitled to participate in oral argument. 474 Mich 1230 (2005). As the entity that initiated these proceedings, the House of Representatives submits that it should be entitled to full participatory rights in this proceeding, on brief and in oral argument. Should there be any question in that regard, the House of Representatives seeks

⁹ In 2006, the legislature passed a supplemental appropriation for the Department of State to help citizens obtain free official state identification cards. Although the Governor signed 2005 PA 71, she line-item vetoed the appropriation stating that "Michigan must focus on encouraging voting rather than imposing financial obstacles between voters and the ballot box." 2006 Journal of the Senate 1138 (No. 52, May 30, 2006). As discussed in the text above, Section 523 of 2005 PA 71 imposes absolutely no financial obstacle to voters.

leave to file this brief and participate in oral argument. A motion to this effect has been filed contemporaneously with this brief.

VI. CONCLUSION

Michigan's photo identification voter law is not unconstitutional on its face. The law will prevent voter fraud and corruption, thus preserving the sanctity of the electoral process and protecting against vote dilution. Because the law only requires a voter who has photo identification to show it at the polls, the law neither unduly infringes on the fundamental right to vote nor imposes a poll tax.

For these reasons, this Court should issue an advisory opinion declaring that the photo identification provisions of 2005 PA 71, MCL 168.523, do not, on their face, violate either the Michigan Constitution or United States Constitution.

Respectfully submitted,

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